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In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

FREEMAN H. RINGER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction under 28 U.S.C. 1331 or 1361 to consider respondents' claims for reimbursement under the Medicare Program, notwithstanding the preclusion of judicial review provision in 42 U.S.C. 405(h).

2. Whether respondents' failure to exhaust their administrative remedies barred them from seeking review of the denial of their Medicare reimbursement claims under 42 U.S.C. 405(g).

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption, are Sanford Holmes, Norman R. Webster-Zieber, Jean Vescio, and Benjamin Winter, M.D. Respondents Holmes, Webster-Zieber, and Vescio sought to represent a class of Medicare beneficiaries who had undergone bilateral carotid body resection surgery and had claimed reimbursement prior to the time the suit was filed in district court. Respondent Ringer, who had not yet undergone the surgery when the suit was filed, sought to represent a class of Medicare beneficiaries who had not yet undergone the surgery and, hence, had not yet claimed reimbursement. App. B, *infra*, 11a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a), as amended by order dated December 30, 1982, is reported at 684 F.2d 643. The opinion as reproduced in App. A, *infra*, incorporates corrections made pursuant to order dated February 1, 1983. The opinion of the district court (App. B, *infra*, 11a-17a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1982 (App. D, *infra*, 19a), and a petition for rehearing was denied on December 30, 1982 (App. C, *infra*, 18a). By order dated March 22, 1983, Justice

Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Social Security Act, Title 28 of the United States Code involved in this case are reproduced at App. E, *infra*, 20a-22a.

STATEMENT

This case concerns the jurisdiction of a federal district court to entertain a challenge to an administrative ruling barring reimbursement for a particular medical procedure under the Health Insurance for the Aged Act (42 U.S.C. (& Supp. IV) 1395 *et seq.*), commonly known as the Medicare Act.

1. The Medicare Program is divided into two parts. Part A of the Act (42 U.S.C. (& Supp. IV) 1395e to 1395i-2) provides insurance for hospital and related post-hospital services. 42 U.S.C. (& Supp. IV) 1395c and 1395d. Part B establishes a voluntary program of supplementary medical insurance covering, in general, 80% of the reasonable charges for physicians' services, medical supplies, and laboratory tests. 42 U.S.C. (& Supp. IV) 1395k, 1395*l* and 1395x(s). In addition to other limitations on coverage, the Act provides that no payment shall be made under Part A or Part B for any expenses incurred for items or services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury * * *." 42 U.S.C. (Supp. IV) 1395y(a)(1).

The payment of benefits under Part B is administered by private insurance carriers pursuant to contracts entered into with the Secretary of Health and Human Services (HHS). 42 U.S.C. (& Supp. IV) 1395u. The claimant is entitled to an evidentiary hearing con-

ducted by the carrier if his claim is initially denied by the carrier and the amount in controversy is $100 or more. 42 U.S.C. (& Supp. IV) 1395u(b)(3)(C); see *Schweiker* v. *McClure*, 456 U.S. 188 (1982). Congress has foreclosed all judicial review of the carrier's denial of a claim after a hearing, *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), whether the denial is based on the facts of the particular case or on an administrative instruction of general applicability issued by the Secretary.[1] This case principally concerns the availability of judicial review of benefit claims under Part A of the Medicare Program, which was not directly involved in *Schweiker* v. *McClure* or *United States* v. *Erika, Inc.*[2]

The Medicare Act and implementing regulations establish a detailed procedure for administrative review of claims for benefits under Part A. The Act directs the Secretary to determine the amount of benefits payable under Part A "in accordance with regulations prescribed by him" (42 U.S.C. 1395ff(a); see also 42 U.S.C. (& Supp. IV) 1395f, 1395g and 1395x(v)), but the Secretary is authorized to enter into a contract with a fiscal intermediary (such as a Blue Cross Association) under which the intermediary will determine the amount of benefits payable to the provider of services and make those payments directly to the provider on behalf of the Secretary. 42 U.S.C. (& Supp. IV) 1395h; 42 C.F.R. 405.702. If an individual is dissatisfied with the intermediary's determination, and the amount remaining in

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[1] In *Erika*, the carrier's denial of the full amount of reimbursement requested by the claimant was based in part on an administrative instruction issued to the carrier. See *Erika, Inc.* v. *United States*, 634 F.2d 580, 590-591 (Ct. Cl. 1980).

[2] Although respondents initially challenged actions of the Secretary in administering the Part B Program (E.R. 7, 33), that aspect of the case was not addressed by the court of appeals. ("E.R." refers to the Excerpt of Record filed in the court of appeals.)

controversy is $100 or more, the individual is entitled to an administrative hearing by the Secretary as provided in 42 U.S.C. (Supp. IV) 405(b). See 42 U.S.C. 1395ff(b)(1)(C) and (b)(2); 42 C.F.R. 405.720.[3] If the claim again is denied, he may seek review by the Appeals Council in HHS. 42 C.F.R. 405.724; 20 C.F.R. 404.967. The individual then is entitled to judicial review of "the Secretary's final decision after such hearing," as provided in 42 U.S.C. (Supp. IV) 405(g), if the amount remaining in controversy after the Appeals Council review is $1000 or more. 42 U.S.C. 1395ff(b)(1)(C) and (b)(2); 42 C.F.R. 405.730; 20 C.F.R. 404.981 and 422.210.

Section 405(g) in turn provides that an individual, "after a final decision of the Secretary made after a hearing to which he was a party," may obtain judicial review of that decision. Finally, Section 205(h) of the Act, as codified at 42 U.S.C. 405(h) and made applicable to Medicare cases by 42 U.S.C. 1395ii, provides that no findings of fact or decision of the Secretary may be reviewed by any tribunal "except as herein provided"—*i.e.*, except pursuant to 42 U.S.C. (Supp. IV) 405(g)—and that no action shall be brought against the United States or the Secretary under 28 U.S.C. 1331 or 1346[4] "to recover on any claim arising under the [Medicare Act]."

2. In January 1979, the Health Care Financing Administration (HCFA) in HHS issued an administrative instruction to Medicare Part A intermediaries and Part B carriers informing them that no reimbursement was to be made under the Medicare Program for expenses incurred in connection with a surgical procedure known as bilateral carotid body resection (BCBR) if the procedure was performed to relieve symptoms of pulmonary

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[3] There is an intervening layer of administrative reconsideration between the intermediary's initial denial and an administrative law judge ("ALJ") hearing. 42 C.F.R. 405.710-716.

[4] See note 12, *infra*.

distress (45 Fed. Reg. 71431-71432 (1980)). HCFA explained that BCBR had been "shown to lack general acceptance of the professional medical community" and that "controlled clinical studies establishing the safety and effectiveness of this procedure are needed" (*id.* at 71431). Accordingly, the instruction provided that BCBR operations to relieve pulmonary symptoms "must be considered investigational and cannot be considered reasonable and necessary within the meaning of [42 U.S.C. (Supp. IV) 1395y(a)(1)]" (45 Fed. Reg. 71431 (1980)). HCFA did state, however, that although reimbursement would not be made for the surgery generally, carotid body resection had been accepted by the medical community as effective to remove a mass in the carotid body itself, irrespective of symptoms, and that another specialized procedure in the carotid area also would be treated as reimbursable (*id.* at 71431-71432).

HCFA issued the instruction on the basis of advice from the Public Health Service and a special BCBR Task Force of the National Heart, Lung and Blood Institute of the National Institutes of Health (App. A, *infra*, 2a; 45 Fed. Reg. 71426 (1980)). The Public Health Service had "consistently advised HCFA" that the BCBR procedure, when performed to relieve the symptoms of pulmonary conditions such as asthma and emphysema, lacked general acceptance by the professional medical community "because of questions concerning efficacy and safety" (*id.* at 71426). Similarly, the 12-member Task Force was "unanimous in its view that before any procedure can be recommended as a therapeutic measure there should be a clear demonstration of efficacy and documentation that risk is acceptably small"; in the case of BCBR, the Task Force concluded, "neither criterion is met" (*id.* at 71429). The Task Force further observed that "[e]ven in the hands of experienced surgeons the procedure has a significant in-hospital mortality rate, and theoretical considera-

tions suggest that the risk of hypoventilation may be increased, especially in patients with chronic obstructive pulmonary disease" (*ibid.*).

After the instructions were issued, however, a number of Medicare beneficiaries nevertheless were able to receive reimbursement under Part A of the Act for hospital-related expenses associated with BCBR by obtaining a favorable ruling from an administrative law judge ("ALJ") after an administrative hearing or, in certain cases, from the Appeals Council (E.R. 57-80), because neither the ALJ nor the Appeals Council was bound by the intermediary instruction.[5] Accordingly, in October 1980, HCFA issued a formal administrative ruling, binding upon ALJs and the Appeals Council, that prohibited payments under Medicare for BCBR performed to relieve symptoms of pulmonary distress. 45 Fed. Reg. 71426-71427 (1980). HCFA explained that it interpreted the statutory prohibition against reimbursement for services that are not "reasonable and necessary" to "exclude from Medicare coverage medical and health care services and items that are not demonstrated to be safe and effective by acceptable clinical evidence" (*id.* at 71426). After reviewing the administrative proceedings in which the Appeals Council had permitted payment and consulting once more with the Public Health Service, HCFA again was unable to find that BCBR is safe and effective (*id.* at 71426, 71427).

b. In September 1980, respondents commenced this action in the United States District Court for the Central District of California, seeking declaratory and injunctive relief to prohibit the Secretary from refusing to recognize BCBR surgery as a "reasonable and necessary" treatment for obstructive pulmonary conditions

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[5] The Part B carriers' denials of claims for reimbursement for physicians and other services could not be appealed administratively to HHS (see page 3, *supra*), and the carriers' denials of coverage pursuant to the instruction therefore were final.

and to enjoin the Secretary from enforcing the instructions that prevented claimants from receiving reimbursement from intermediaries or from obtaining a fair hearing on their claims before an ALJ. Respondents consist of Dr. Benjamin Winter—a physician who developed a surgical technique for performing BCBR and is a chief proponent of the procedure (45 Fed. Reg. 71427 (1980))—and four Medicare beneficiaries. At the time the complaint was filed, three of the four beneficiary respondents had undergone BCBR surgery and had been denied reimbursement by fiscal intermediaries, but none had yet had a hearing before an ALJ. The fourth beneficiary, respondent Ringer, had not yet had the surgery.[6]

On February 18, 1981, the district court dismissed the complaint for lack of jurisdiction (App. B, *infra*, 11a-17a). The district court found that "[t]he essence of [respondents'] claim * * * is a claim of entitlement to benefits for the BCBR procedure" and held that such an action could not be brought under 42 U.S.C. 405(g) until the claimants had exhausted their administrative remedies (App. B, *infra*, 13a). The court noted that an appearance of futility alone does not render exhaustion unnecessary and that exhaustion could not be regarded as futile in this case in any event because, in the administrative hearings then being sought by respondents, the Secretary's position as to the reasonableness or efficacy of the procedure might change (*id.* at 13a-14a).[7]

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[6] Respondents sought to represent a class of beneficiaries seeking reimbursement for BCBR (E.R. 5-6, 31-32), but the district court dismissed the suit for lack of jurisdiction before ruling on the class certification issue (App. B, *infra*, 11a).

[7] The district court also held that respondents' constitutional argument—that forcing them to undergo administrative appeals in order to receive reimbursement violated their due process rights—was "inextricably intertwined with their challenge [to] the validity of the determination denying Medicare coverage"

c. The court of appeals reversed the dismissal of the complaint and remanded for consideration of respondents' claims on the merits. The court of appeals found that a "major thrust" of respondents' complaint was that the Secretary's instructions, barring reimbursement for the BCBR procedure on the ground that it had not been shown to be safe and effective, are an "unlawful interference in the administrative process for determining benefits" (App. A, *infra*, 3a). In the court's view, this is a "procedural" claim, not a substantive claim for benefits, and to this extent the instant suit therefore is not an action "to recover on [a] claim arising under" the Medicare Act for purposes of the jurisdictional bar in 42 U.S.C. 405(h). Accordingly, the court held that this "procedural" claim could be heard in a suit brought under 28 U.S.C. 1331 or 1361, and did not have to be brought under the special jurisdictional provision in 42 U.S.C. 405(g) (App. A, *infra*, 4a-6a).

The court of appeals recognized that in addition to challenging the Secretary's "procedures," respondents contended that the Secretary had "reached an improper substantive result in the process of determining whether benefits should be awarded" (App. A, *infra*, 6a). The court of appeals acknowledged that this contention did constitute a claim for benefits that had to be brought under 42 U.S.C. 405(g) and that a district court has jurisdiction under that Section only after the claimant has exhausted his administrative remedies. But the court of appeals nevertheless concluded that respondents' failure to pursue the administrative process to completion by obtaining an ALJ hearing and Appeals Council review before filing this action under 42 U.S.C. 405(g) did not require dismissal. The court advanced two reasons for this holding. First, the court held that the Secretary's issuance of a ruling requiring ALJs and the

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and that exhaustion was required for this claim as well (App. B, *infra*, 14a).

Appeals Council to deny claims for BCBR operations "indicated that [the Secretary] has no interest in appeals" and that "the Secretary believes appeals are worthless to the Agency as well as the claimant" (App. A, *infra*, 8a-9a). Second, the court reasoned that respondents' interest in having an initial benefit determination made "without the prejudice—and the necessary appeal—resulting from the HCFA ruling" barring the payment of claims by the intermediary or at the administrative level in HHS justified immediate judicial review (*id.* at 9a-10a).[8]

REASONS FOR GRANTING THE PETITION

The decision below cannot be reconciled with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and it conflicts with decisions of other courts of appeals. Respondents' challenge to the Secretary's issuance of a ruling prohibiting Medicare reimbursement for BCBR operations in certain contexts plainly is "an action to recover on [a] claim" arising under the Social Security Act within the meaning of the jurisdictional bar in 42 U.S.C. 405(h), because respondents seek to overturn the Secretary's determination that their BCBR operations were not "reasonable and necessary" medical services for which reimbursement may be made. Accordingly, the district court lacked jurisdiction over the complaint under 28 U.S.C. 1331. Even if the

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[8] The court of appeals held that participants in the Medicare Program who had not yet even applied for benefits for BCBR, such as respondent Ringer, had not sufficiently exhausted their administrative remedies, but that this would not preclude the district court on remand from ordering the Secretary to withdraw the BCBR ruling on the basis of the claims of those who had filed applications (App. A, *infra*, 9a n.4). The court of appeals also indicated that the district court would be free to award benefits to claimants who had applied for them if the district court concluded that it was appropriate to do so (*ibid.*).

court of appeals were correct in characterizing respondents' claim as "procedural" to the extent that they challenge the Secretary's authority to determine by rule that a particular service has not been shown to be safe and effective, this Court's decisions in *Mathews* v. *Eldridge* and *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), make clear that "procedural" challenges also must be brought under 42 U.S.C. 405(g), not 28 U.S.C. 1331. The exercise of mandamus jurisdiction under 28 U.S.C. 1361 was precluded in this case as well.

In addition, respondents' failure to exhaust their administrative remedies prior to bringing suit clearly foreclosed the district court from exercising jurisdiction under 42 U.S.C. 405(g). That Section by its terms authorizes judicial review only of a "final decision" of the Secretary rendered "after a hearing." See also 42 U.S.C. 1395ff(b). The court of appeals' holding that respondents nevertheless may be excused from obtaining a decision by an ALJ after a hearing and then seeking review by the Appeals Council is inconsistent with this Court's decisions in *Weinberger* v. *Salfi* and *Mathews* v. *Eldridge* and with decisions of other courts of appeals.

The court of appeals' ruling in this case encourages circumvention of the administrative procedures and jurisdictional limitations carefully crafted by Congress and the Secretary, and thereby poses a serious threat to the Secretary's ability efficiently to administer the Medicare Program and other Social Security programs in the manner Congress intended. Review by this Court therefore is warranted.

1.a. The court of appeals' holding that respondents' challenge to the intermediary and carrier instructions and subsequent formal ruling that prohibited Medicare reimbursement for BCBR could be brought under 28 U.S.C. 1331 is flatly inconsistent with this Court's decision in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). In

Salfi, the plaintiffs brought an action under 28 U.S.C. 1331 challenging provisions restricting payment of benefits to surviving widows and children under the Social Security Act, 42 U.S.C. 416(c)(5) and (e)(2), on constitutional grounds. The Court concluded that the suit was one "seek[ing] to recover Social Security benefits" (422 U.S. at 756-757) and held that jurisdiction under 28 U.S.C. 1331 was barred by the third sentence of 42 U.S.C. 405(h), which provides that "[n]o action" shall be brought against the United States or the Secretary under 28 U.S.C. 1331 "to recover on 'any claim arising under [Title II]' of the Social Security Act." See 422 U.S. at 757-760. The Court rejected the contention that the plaintiffs' action was not one to recover on a claim "arising under" the Social Security Act because it also arose under the Constitution. The Court explained that not only were plaintiffs seeking to recover Social Security benefits, but also it was the Social Security Act that provided both the standing and the substantive basis for the presentation of their constitutional contentions. *Id.* at 760-761. Thus, the Court concluded, the jurisdictional bar in the third sentence of Section 405(h) "extends to any 'action' seeking 'to recover on any [Social Security] claim'—irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary or by his nondiscretionary application of allegedly unconstitutional statutory restrictions." 422 U.S. at 762, quoting 42 U.S.C. 405(h).

By virtue of 42 U.S.C. 1395ii, Section 405(h) applies to the Medicare Act "to the same extent" as it applies to Title II of the Social Security Act, which was involved in *Salfi*. The decision in *Salfi* therefore controls here. If Section 405(h) bars jurisdiction under 28 U.S.C. 1331 even over a suit challenging a *statutory prohibition* barring the payment of benefits in a certain category of cases, as the Court held in *Salfi*, a fortiori Section 405(h) must bar federal question jurisdiction

over a suit challenging an *administrative ruling* issued by the Secretary that also prohibits the payment of benefits in a certain category of cases. To paraphrase the language of *Salfi* (422 U.S. at 762, quoted at page 11, *supra*), Section 405(h) bars jurisdiction under 28 U.S.C. 1331 irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the Secretary, acting through the ALJs and Appeals Council, denying benefits in individual cases because he has found on the particular facts presented at a hearing that the medical procedure was not reasonable or necessary, or by an ALJ's or the Appeals Council's nondiscretionary application of an allegedly unlawful ruling issued by the Secretary that denies payment for this same reason.

The court of appeals attempted to avoid this result by characterizing respondents' claim as being in part a "procedural" one: a challenge to the Secretary's assertedly "unlawful interference" in the administrative processing of individual benefit claims (App. A, *infra*, 3a) by adopting a "presumptive rule" that the BCBR is not a reasonable and necessary medical service (*id.* at 5a). Even if respondents' challenge to the Secretary's instructions and ruling were correctly characterized as "procedural," however, that would not remove this case from the jurisdictional bar in 42 U.S.C. 405(h). The issues involved in *Mathews* v. *Eldridge* and *Califano* v. *Yamaski*—whether the claimants were entitled to a hearing prior to the termination of benefits or commencement of recoupment—clearly were "procedural" in nature, and yet jurisdiction in those cases was found under 42 U.S.C. 405(g), not 28 U.S.C. 1331. 424 U.S. at 327; 442 U.S. at 697-698. See also *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); cf. *Ellis* v. *Blum*, 643 F.2d 68, 77-78 (2d Cir. 1981).

In any event, and contrary to the court of appeals' characterization, respondents' objection is not "proce-

dural" in nature; they simply take issue with the Secretary's substantive determination that BCBR has not been recognized as safe and effective and thus does not qualify for reimbursement under the Medicare Act. Indeed, respondents' challenge to the Secretary's "presumptive rule" is essentially identical for present purposes to the issue involved in *Weinberger* v. *Salfi*. There, the plaintiffs challenged the duration-of-relationship prerequisite to the receipt of survivors benefits on the ground that it created an impermissible irrebuttable presumption[9] that a relationship of less than nine months' duration was a sham; the plaintiffs there, like respondents here, contended that claimants should have an opportunity to have the relevant issue decided on a case-by-case basis in the course of administrative proceedings. See 422 U.S. at 753, 767-768, 770-772, 782-785. The holding in *Weinberger* v. *Salfi* foreclosing jurisdiction under 28 U.S.C. 1331 therefore applies equally here, irrespective of the "procedural" label respondents and the court of appeals attach to their claim.

b. The decision below conflicts with decisions of other courts of appeals that have recognized that, when a claimant brings an action seeking increased reimbursement under the Social Security Act by urging the court to declare invalid a rule or regulation that serves to limit reimbursement in administrative proceedings, the action falls within the scope of the jurisdictional bar in 42 U.S.C. 405(h) and therefore cannot be brought under 28 U.S.C. 1331. See *Hadley Memorial Hospital, Inc.* v. *Schweiker*, 689 F.2d 905, 908-910 (10th Cir. 1982); *Hopewell Nursing Home, Inc.* v. *Schweiker*, 666 F.2d 34, 39 (4th Cir. 1981); *Humana of South*

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[9] See 422 U.S. at 753 and 770-772, citing *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); and *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Carolina, Inc. v. *Califano*, 590 F.2d 1070, 1079 (D.C. Cir. 1978); *Rhode Island Hospital* v. *Califano*, 585 F.2d 1153, 1158 (1st Cir. 1978). See also *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 938 (D.C. Cir. 1982), cert. denied, No. 82-991 (Feb. 22, 1983); *Association of Am. Medical Colleges* v. *Califano*, 569 F.2d 101, 106-108 (D.C. Cir. 1977).

The courts of appeals also are divided on the question whether the jurisdictional bar in 42 U.S.C. 405(h) is applicable to claims, unlike that involved here, that accurately may be described as procedural in nature. The District of Columbia Circuit has held, for example, that challenges to the Secretary's failure to follow the notice and comment procedures of the Administrative Procedure Act[10] in issuing a rule under the Social Security Act may be brought under 28 U.S.C. 1331 notwithstanding the jurisdictional bar in 42 U.S.C. 405(h). See *National Ass'n of Home Health Agencies* v. *Schweiker*, *supra*, 690 F.2d at 936-937; *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1080-1081.[11] See also *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 283, 291-292 (8th Cir.), cert. denied, 429 U.S. 977 (1976); cf. *Ellis* v. *Blum*, *supra*, 643 F.2d at 82. The Tenth Circuit recently reached a contrary conclusion, holding that Section 405(h) bars federal question jurisdiction over Administrative Procedure Act ("APA") and related procedural

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[10] The Secretary has chosen to follow these procedures notwithstanding the exception from APA notice and comment requirements for benefits programs. 5 U.S.C. 553(a); see 36 Fed. Reg. 2532 (1971).

[11] Even the District of Columbia Circuit would regard respondents' challenge to the regulation here to be covered by the jurisdictional bar in 42 U.S.C. 405(h) because they seek to invalidate a regulation on the merits and thereby obtain increased reimbursement. *Humana of South Carolina, Inc.* v. *Califano*, *supra*, 590 F.2d at 1029.

challenges to the administration of the Medicare Program. See *Hadley Memorial Hospital, Inc.* v. *Schweiker, supra*, 689 F.2d at 910-912. Accord, *American Ass'n of Councils of Medical Staffs* v. *Califano*, 575 F.2d 1367, 1370-1373 (5th Cir. 1978); *Trinity Memorial Hospital of Cudahy, Inc.* v. *Associated Hospital Service, Inc.*, 570 F.2d 660, 667 (7th Cir. 1977). Review is warranted to resolve these conflicts among the circuits.[12]

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[12] In addition to finding federal question jurisdiction under 28 U.S.C. 1331, the court of appeals held that the district court had mandamus jurisdiction under 28 U.S.C. 1361 to entertain respondents' "procedural" claim (App. A, *infra*, 10a). This Court previously has reserved the question whether 42 U.S.C. 405(h) bars mandamus jurisdiction under 28 U.S.C. 1361 over an action arising under the Social Security Act. *Califano* v. *Yamasaki, supra*, 442 U.S. at 698; *Norton* v. *Mathews*, 427 U.S. 524, 529-530 (1976); *Mathews* v. *Eldridge, supra*, 424 U.S. at 332 n.12.

The third sentence of Section 205(h) of the Social Security Act, as originally enacted, provided that an action may not be brought under Section 41 of Title 28 of the United States Code to recover on a claim arising under Title II of the Social Security Act. As the Court explained in *Weinberger* v. *Salfi, supra*, 442 U.S. at 756 n.3, when Section 205(h) was enacted, Section 41 of Title 28 contained all of that Title's grants of jurisdiction to federal district courts, except for special purpose jurisdictional statutes of no relevance to Social Security cases. The mandamus statute, however, was not then in force and was not enacted until 1962 (Pub. L. No. 87-748, Section 1(a), 76 Stat. 744). (The express reference in Section 405(h) to 28 U.S.C. 1331 and 1346 was substituted by the codifiers, see 42 U.S.C. 405 note, 518, whose "choice, 'made * * * without the approval of Congress ... should be given no weight.'" *North Dakota* v. *United States*, No. 81-773 (Mar. 7, 1983), slip op. 10 n.13, quoting *United States* v. *Welden*, 377 U.S. 95, 99 n.4 (1964). It nevertheless would be consistent with the "sweeping" language of the third sentence of Section 205(h) (see *Weinberger* v. *Salfi, supra*, 422 U.S. at 757) to interpret it as barring jurisdiction under the later-enacted mandamus statute as well. And even if the third sentence does not foreclose mandamus jurisdiction, the

2. The court of appeals recognized that in addition to presenting what it found to be a "procedural" claim, respondents' action also embraces substantive claims for Medicare benefits to the extent that respondents seek a ruling that their BCBR operations were reasonable and necessary medical services. The court acknowledged that 42 U.S.C. 405(g) is the exclusive basis of jurisdiction for judicial review of respondents' substantive claims, but the court once again seriously misconstrued the statutory scheme by holding that respondents did not have to pursue their administrative remedies through the ALJ hearing stage and subsequent Appeals Council review before bringing suit under Section 405(g).

As explained above (see page 4, *supra*), the special judicial review section applicable to benefit determinations under Part A of the Medicare Program, 42 U.S.C. 1395ff(b), provides that the claimant is entitled to "judicial review of the Secretary's final decision after [a]

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second sentence of Section 205(h)—which provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided"—would bar review under the mandamus statute of a decision denying benefits.

Mandamus jurisdiction cannot in any event be permitted to circumvent the clear congressional purpose expressed in 42 U.S.C. 405(g) and (h)—to bar judicial review of decisions of the Secretary in administering the Social Security Act except as provided in that Act itself, and thereby to channel all judicial review through 42 U.S.C. 405(g)—at least where, as here, the particular claim involved in fact may be raised in an action under Section 405(g). Moreover, the instant case would be an especially inappropriate occasion for the exercise of mandamus jurisdiction, in view of the discretionary and judgmental nature of the Secretary's decision to bar reimbursement for the BCBR procedure, respondents' failure to exhaust their administrative remedies, and the availability of judicial relief under 42 U.S.C. 405(g). See, *e.g.*, *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912; *Herzog* v. *Secretary of HEW*, 686 F.2d 1154, 1161 n.5 (6th Cir. 1982).

hearing as is provided in [42 U.S.C. 405(g)]." Section 405(g) likewise authorizes judicial review only of a "final decision of the Secretary made after a hearing * * *." In this case, however, respondents sought judicial review prior to their hearings before an ALJ and the Appeals Council, at a time when the Secretary had not yet rendered a "final decision" on their claims.

This Court has excused claimants from full exhaustion of administrative remedies under the Social Security Act prior to seeking judicial review under 42 U.S.C. 405(g) only in two narrowly defined situations: first, where the *Secretary* has concluded that further administrative proceedings are not necessary (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 766-767; *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330); and second, where the claimant's interest in having a prompt resolution is so great that deference to the Secretary's judgment that further exhaustion should be required is inappropriate (*Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330, 332). It is clear that neither exception is applicable here.

a. In *Weinberger* v. *Salfi*, the Court stressed that a "final decision" of the Secretary is a "statutorily specified jurisdictional prerequisite" and that Section 405(g) therefore is "something more than simply a codification of the judicially developed doctrine of exhaustion" (422 U.S. at 766). The Court held, however, that "the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration" and that, although "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary," the statutory scheme does not bar the Secretary from determining in particular cases that full internal exhaustion is not necessary in order for a decision to be final for purposes of judicial review. 422 U.S. at 766-767.

Consistent with this view, the Court held in *Salfi* that the Secretary could dispense with the requirement of an ALJ hearing where he has resolved all issues regarding eligibility for benefits except one—the constitutionality of the statutory provision—in favor of the claimant and the remaining constitutional issue is beyond his competence to decide. 422 U.S. at 767. The Secretary did not challenge the sufficiency of the allegations of exhaustion in *Salfi*, and the Court interpreted this failure as a determination by the Secretary that the denial of benefits prior to a hearing was "final" for purposes of the litigation challenging the constitutionality of the statutory duration-of-relationship requirement. The Secretary has now codified the result in *Salfi* by incorporating in HHS regulations a formal procedure for dispensing with the need for an ALJ hearing or Appeals Council review prior to seeking judicial review, if the claimant and HHS agree that all other eligibility criteria have been satisfied and the only remaining issue is the constitutionality of a statutory provision. 42 C.F.R. 405.718(d).

The instant case is wholly different from *Salfi*. Here, the Secretary moved to dismiss the action under 42 U.S.C. 405(g) on the ground that respondents had not exhausted their administrative remedies, thereby refuting any suggestion that he had determined that the denial of coverage for BCBR prior to an ALJ hearing or Appeals Council review was a sufficiently "final decision" for purposes of judicial review. The court of appeals nevertheless excused exhaustion of remedies because it believed that the 1980 HCFA ruling, while "nominally leaving the administrative review process open, * * * not only makes appeals futile, it also indicates that the Secretary believes appeals are worthless to the Agency as well as the Claimant" (App. A, *infra*, 8a-9a). This reasoning is seriously flawed.

The court of appeals pointed to nothing to suggest that the Secretary, by issuing the ruling, had waived the requirement of full exhaustion of administrative remedies. The Secretary's regulations, for example, contain no provisions comparable to those applicable to constitutional issues that establish a procedure for the bypassing of ALJ and Appeals Council review whenever the question of the validity of a ruling is at issue. In the absence of such an exception, the regulations establish that a final decision for purposes of judicial review results only after Appeals Council review. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 765; 20 C.F.R. 404.900(a)(5); 42 C.F.R. Part 405, subpart G app.[13] And insofar as the court's conclusion rested on its own view that further exhaustion would be futile, that holding is inconsistent with the teaching of the Court's decision in *Weinberger* v. *Salfi* that a court may not substitute its judgment for that of the Secretary on the question of futility.

b. The court of appeals' holding with regard to the futility of exhaustion is truly bizarre in the circumstances of this case, because respondents in fact obtained meaningful administrative review at an ALJ hearing while this case was pending before the court of appeals. This development was called to the court's at-

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[13] In 1980, Congress amended 42 U.S.C. (& Supp. V) 1395*oo*(f), which provides for judicial review of reimbursement decisions under Part A by the Provider Reimbursement Review Board (PRRB) in HHS in a manner similar to that provided for individual claims under 42 U.S.C. 405(g), to authorize immediate judicial review of a question of law or regulations whenever the *PRRB* determines that it is without authority to decide the question. This indicates that the solution preferred by Congress when a case presents a legal question that cannot be resolved at the administrative level likewise is not to permit a *court* to excuse exhaustion, as the court of appeals did here, but to provide a mechanism for the Secretary to expedite that exhaustion. See *National Ass'n of Home Health Agencies* v. *Schweiker*, *supra*, 690 F.2d at 939; H.R. Rep. No. 96-1167, 96th Cong., 2d Sess. 394 (1980).

tention in the government's petition for rehearing, yet the court did not alter its holding.

After this suit was filed, an ALJ in fact held an extensive hearing on claims filed by 132 claimants who had had BCBR surgery performed by Dr. Winter and were represented by him in administrative proceedings. See *In the Case of Benjamin Winter, M.D., Representative for 132 Claimants* (Feb. 27, 1982), Exh. A. to Appellee's Petition for Rehearing. The beneficiaries whose claims were before the ALJ included the three respondents in this case (Holmes, Webster-Zieber, and Vescio) who had already had the surgery when this case was filed (*id.* at 5, 9).[14] These three respondents and 60 other claimants had the surgery before HCFA issued the ruling in 1980 binding the ALJs and the Appeals Council (*id.* at 1). The ALJ concluded that the 1980 ruling did not govern such pre-1980 ruling claims[15] and proceeded to reach the merits of the 63 claims that were properly before him. After examining the extensive medical testimony and other evidence (*id.* at 16-33), the ALJ concluded that BCBR was not a "reasonable and necessary" medical procedure and, on this basis, denied reimbursement for some 45 claimants, including respondent Vescio (*id.* at 8-9, 35-44). However, the ALJ refused to consider some 36 claims on the merits, including those of respondents Holmes and Webster-Zieber, because Dr. Winter, as their representative, had not requested an ALJ hearing for them within 60 days of the denial of their individual claims at the reconsideration stage, as required by HHS regula-

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[14] The fourth respondent who is a Medicare beneficiary, Ringer, had not yet had the BCBR surgery and therefore had not even satisfied the jurisdictional requirement of having filed an application for benefits for such surgery. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 330.

[15] The ALJ held that the 1980 ruling *was* binding with respect to the claims of beneficiaries who had the BCBR surgery after the ruling was issued, and he denied payment to 59 claimants who had post-ruling surgery on that basis alone (*In the case of Benjamin Winter, M.D., supra*, slip op. 1-4, 34-35, 43).

tions (*id.* at 4-7; see 42 C.F.R. 405.722). But for this procedural default, the claims of these other pre-ruling claimants also would have been addressed on the merits by the ALJ.[16] Accordingly, although the ALJ ultimately denied recovery, it is manifest from the ALJ's extensive consideration on the merits of the very type of claims respondents seek to raise in this action that the pursuit of the administrative process was not regarded by the Secretary as futile.[17] The court of appeals' holding that the district court should have allowed the case to proceed without further exhaustion of administrative remedies thus is totally inexplicable.

The individuals whose claims were denied by the ALJ may seek review by the Appeals Council. Given the Appeals Council's prior decision awarding benefits for the BCBR procedure, there is no reason to suppose that the Secretary regards such an appeal as futile for the claimants not covered by the 1980 ruling. However, after the court of appeals rendered its decision in this case, counsel for the claimants in the administrative proceedings requested that the Appeals Council stay its consideration of the appeals because of the "intervening event" of the court of appeals' decision. Counsel stated that the court of appeals had "remanded the case to the District Court for trial of many of the legal issues now before the Appeals Council." Thus, counsel contended, the district court's decision after remand in the instant case regarding "the validity of HCFA's BCBR policy" "will also resolve—or at least offer substantial guidance in resolving—many of the BCBR cases pending before

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[16] Thus, respondents Holmes and Webster-Zieber not only failed to exhaust their administrative remedies, but committed a procedural default that *foreclosed* recovery at the administrative level. Nevertheless, they apparently contend that they are entitled to relief in the instant suit.

[17] Given the ALJ's holding that the 1980 HCFA ruling did not apply to the respondents who had had the BCBR procedure, they do not even have standing in this case to challenge its validity.

the Appeals Council."[18] Respondents thus have stood the doctrine of exhaustion on its head, urging that the responsible *administrative* body should stay its hand pending respondents' exhaustion of *judicial* remedies. This blatant disregard of exhaustion requirements by respondents and the court of appeals should not go uncorrected.

c. The court of appeals also believed that the exception to the exhaustion requirement recognized in *Mathews* v. *Eldridge*, was applicable here (App. A, *infra*, 9a-10a). This holding, too, was quite mistaken. In *Mathews* v. *Eldridge*, the Court stated that even when the Secretary has determined that a particular decision is not yet final for purposes of seeking judicial review, "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate" (424 U.S. at 330). The claim of the plaintiff in *Mathews* v. *Eldridge* that he had a constitutional right to a hearing prior to the termination of his disability benefits was found to be such an issue. The Court relied on two factors: first, the constitutional issue was "entirely collateral to the substantive claim of entitle-

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[18] See Exh. B to Appellee's Petition for Rehearing. We have been furnished by HHS with the following information concerning counsel's request: The Appeals Council granted counsel's request that the administrative appeals be held in abeyance, apparently pursuant to a general policy of the Appeals Council to grant a stay when the claimant so requests and has given a reasonable basis for doing so. However, in response to a February 17, 1983 letter from the Administrator of HCFA requesting that the Appeals Council proceed with the appeals, the Appeals Council, by letter dated March 25, 1983, requested counsel to inform it within 20 days of any reasons why it should not decide the appeals. By letter dated April 12, 1983, counsel again requested that the appeals be stayed, citing, *inter alia*, a desire to avoid duplicative proceedings before the Appeals Council and the district court. As of the date of the filing of this petition for a writ of certiorari, the Appeals Council had not taken any further action on the matter of the stay.

ment"; and second, the claim of a constitutional right to a predeprivation hearing rested on the proposition that full relief could not be obtained following a postdeprivation hearing, and in view of his physical condition and dependency on disability benefits, the plaintiff had made a "colorable claim" that an erroneous pre-hearing termination of benefits would injure him in a way that would not be recompensable through retroactive payments if he later were found eligible after a hearing.

Neither of the factors supporting the exception in *Mathews* v. *Eldridge* is present here. Respondents' challenge to the instructions and subsequent ruling barring reimbursement for BCBR is not at all "collateral" to their substantive claim of entitlement; it is intimately bound up with respondents' substantive contention that the BCBR surgery is reasonable and necessary within the meaning of the Medicare Act. Moreover, respondents have advanced no colorable claim that an erroneous denial of benefits for the BCBR procedure at an early stage in the administrative proceedings will injure them in a way that cannot adequately be remedied if they are subsequently awarded benefits upon a finding by an ALJ, the Appeals Council, or even a court on judicial review under 42 U.S.C. 405(g) that BCBR is a reasonable and necessary procedure. Respondents are not receiving benefits that HHS has sought to terminate and on which they might have become dependent. They are simply seeking a one-time reimbursement for a particular medical procedure.

d. The decision below conflicts with rulings of other courts of appeals that have adhered to *Weinberger* v. *Salfi* and *Mathews* v. *Eldridge* and recognized that administrative procedures must be exhausted before seeking judicial review, even where it appears that the particular issue on which judicial review is sought might not be resolved in the claimant's favor at the administrative level. See, *e.g.*, *Hopewell Nursing Home, Inc.* v. *Schweiker*, *supra*, 666 F.2d at 40, 42; *Humana of South Carolina, Inc.* v. *Califano*, *supra*,

590 F.2d at 1075-1076; *Rhode Island Hospital Ass'n* v. *Califano*, *supra*, 585 F.2d at 1159; cf. *Hadley Memorial Hospital, Inc.* v. *Schweiker*, *supra*, 689 F.2d at 912. This conflict, too, warrants resolution.

3. The decision of the court of appeals in this case threatens substantially to disrupt the orderly and efficient administrative determination of claims for benefits under the Medicare Program and the Social Security Act generally. Adherence to the requirement that claims be brought under the special administrative and judicial review provisions of 42 U.S.C. (& Supp. IV) 1395ff, 405(b) and (g), notwithstanding the apparent applicability of a regulation precluding recovery, "assures the Secretary the opportunity prior to [litigation challenging the validity of the regulation] to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions" (*Weinberger* v. *Salfi*, *supra*, 422 U.S. at 762).

The Secretary might determine, for example, that the claimants were barred from recovery in any event because of a procedural default, lack of eligibility, or other reason. Conversely, he might conclude in the course of the administrative review process that reimbursement is appropriate notwithstanding the regulation. As noted above, payment is authorized for the BCBR procedure when performed to remove masses from the carotid bodies, rather than simply to relieve symptoms of pulmonary disease. In addition, the ruling or regulation in question might be found inapplicable to the particular claimant, as was true with respect to the respondents in the instant case who had BCBR surgery before the date of the 1980 HCFA ruling that bound ALJs. And even if the ALJ or Appeals Council ultimately were to deny payment, the evidentiary record developed in the administrative proceedings would furnish a basis for the Secretary to reconsider his prior ruling or for the court, on judicial review under 42 U.S.C. 405(g), to consider fully the merits of the indi-

vidual's claim for benefits and the challenge to the Secretary's denial of benefits.

It is possible that, after the issues relevant to the appropriateness of a particular rule have been fully ventilated within HHS, the Secretary would determine that it would not be necessary for a claimant to have an ALJ hearing and pursue an appeal to the Appeals Council in order to challenge that rule in court. At that point, the Secretary would be free under *Weinberger* v. *Salfi* to waive the requirement of full exhaustion. But until the Secretary has made that judgment with respect to the particular claims in issue, the courts must adhere to the normal requirements of exhaustion.

Under the reasoning of the court of appeals, however, it would appear that virtually any beneficiary whose claim for benefits might be affected or governed by a regulation of general applicability could ignore the special administrative and judicial review process established under 42 U.S.C. (Supp. IV) 405(b) and (g) and bring an independent action under 28 U.S.C. 1331 to challenge the regulation, on the theory that such a suit would be a "procedural" challenge to the Secretary's "interference" with what, according to the beneficiary, should be a case-by-case determination of the claim by intermediaries, HHS employees, ALJs, or the Appeals Council. Even if the court perceived that such a claim in fact constituted a substantive claim for benefits, for which federal question jurisdiction is barred by 42 U.S.C. 405(h), the court could exercise jurisdiction under 42 U.S.C. 405(g): the court of appeals' holding dispensing with the requirement of exhaustion of remedies through the ALJ and Appeals Council stages apparently would apply in any case in which the Secretary had issued a ruling or regulation purporting to bind the ALJs or the Appeals Council. The result would be to subject every ruling and regulation of general applicability to premature judicial attack, divorced from the particular factual setting of the individual's claim.

The question of the scope of 42 U.S.C. 405(g) and (h) with respect to the preclusion of jurisdiction under 28

U.S.C. 1331 and 1361 and the requirement of exhaustion of administrative remedies prior to the bringing of an action under 42 U.S.C. 405(g) thus is one of substantial importance in the administration of the Medicare Act. As we have noted above, these questions already have spawned a number of conflicting decisions by the courts of appeals. Moreover, we have been informed by HHS that there are now pending in the lower courts at least two dozen additional cases under the Medicare Act alone that raise similar questions concerning the scope of Section 405(h) and that in at least ten of these cases the plaintiffs are relying on the court of appeals' decision in this case in seeking immediate judicial review. And the rationale of the decision below, including the strained construction given the preclusion of review and exhaustion requirements of 42 U.S.C. 405(g) and (h), cannot be limited to Medicare cases, but would be equally applicable to the old age, survivors, and disability insurance program under Titles II and XVI of the Social Security Act, under which millions of claims are filed and hundreds of thousands of ALJ hearings are conducted annually.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

APPENDIX A

AMENDED OPINION†

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

No. 81-5413

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZIEBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER,* IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

Argued and Submitted Jan. 8, 1982.
Decided Aug. 19, 1982.
As Amended Dec. 30, 1982.

OPINION

NELSON, Circuit Judge:

The above named plaintiffs, except Benjamin Winter, M.D., (Ringer Group) and the proposed class are allegedly qualified participants in the Medicare program and appeal the order dismissing their action for want of sub-

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† Amended Opinion of Dec. 30, 1982 was corrected by order of the court [dated February 1, 1983].

* We substitute the name of Richard S. Schweiker as successor to Patricia Roberts Harris as Secretary, the original defendant, per Fed.R.App.P. 43.

ject matter jurisdiction entered by the district court on February 17, 1981.

Timely notice of appeal was filed. We note jurisdiction under 28 U.S.C. § 1291 (1976) and vacate the order and remand the cause.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves the administration by the Secretary of Health and Human Services (Secretary) of the Medicare Act (the Act). 42 U.S.C.A. §§ 1395–1395vv (West 1974 & Supp. 1982). Section 1862(a)(1) of the Medicare Act, 42 U.S.C.A. § 1395y(a)(1) (West Supp.1982), precludes reimbursement for any "items or services . . . which are not reasonable and necessary for the diagnosis or treatment of illness or injury. . . ." In January, 1979, the Secretary, through the Health Care Financing Administration (the HCFA), issued an instruction to intermediaries and carriers who service Medicare claims that the operation known as a bilateral carotid body resection (BCBR) was not a "reasonable and necessary" operation. This decision was based on reports of the Public Health Service and a task force of the National Heart, Lung and Blood Institute.

The January, 1979, instruction to intermediaries and carriers prevented the intermediaries and carriers from paying benefits for any BCBR operation. The ruling did not, however, preclude benefits claimants from seeking review of the denial of benefits before an administrative law judge (ALJ). The claimants accordingly brought appeals to ALJs and, until October, 1980, ALJs consistently held that the BCBR operation was reasonable and necessary and allowed payment of benefits. Decisions of ALJs can be reviewed by the Appeals Council of the Social Security Administration, and the Appeals Council, too, has found the BCBR operation reasonable and necessary. *In re Ferguson*, No. 126-12-3830 (HHS Appeals Council, October 18, 1979). The Secretary, apparently seeking to insure that no benefits were paid for

the BCBR operation, issued a ruling in October, 1980, which prohibited payments for the operation. This ruling conclusively held that the BCBR operation "is not established as safe and effective and, therefore, is excluded from medicare coverage under the authority of section 1862(a)(1) of the Act." 45 Fed.Reg. 71,426 (1980). The ruling purported to prohibit ALJs and the Appeals Council from determining that benefits could be paid for BCBR operations, and ALJs have, since the ruling, denied all requests for benefits without a hearing.

The Ringer Group filed this action in the district court in September, 1980. The Group complained that the Secretary's policy prohibiting intermediaries and carriers from awarding benefits for the BCBR operation was an unlawful interference in the administrative process for determining benefits. The October, 1980, ruling—according to the Group—exacerbated this unlawful interference by completely foreclosing any award of benefits within the administrative process. The complaint sought relief in several forms including invalidation of the Secretary's policy and ruling that the BCBR operation is not reasonable and effective, and an injunction requiring the Secretary to declare the BCBR operation reasonable and necessary. The Group claimed that the district court had jurisdiction under 28 U.S.C. § 1361 (1976) (mandamus); 28 U.S.C.A. § 1331 (West Supp.1982) (federal question); and 42 U.S.C.A. § 405(g) (West Supp. 1982) (judicial review under the Medicare Act).

The district court dismissed for lack of jurisdiction. The jurisdictional provisions of the Medicare Act require that any action "to recover on a claim arising under" the Act can only be brought after exhaustion of administrative appeals pursuant to 42 U.S.C.A. § 405(g) (West Supp.1982); jurisdiction for such claims cannot be based on 28 U.S.C.A. § 1331 (West Supp.1982) (federal

question) or 28 U.S.C. § 1361 (1976) (mandamus). *See* 42 U.S.C.A. § 405(h) (West Supp.1982). The district court characterized the Ringer Group's action as essentially an action to recover on a claim and concluded that jurisdiction could not be based on the federal question or mandamus statutes. The district court also concluded that the Group had failed to exhaust its administrative remedies, and therefore concluded that jurisdiction over substantive claims could not be based on subsection 405(g). The Ringer Group brought this timely appeal.

DISCUSSION

Two questions are presented on appeal. The first is whether the district court erred in concluding that the Ringer Group's action was essentially one to recover on a claim arising under the Act. The second question is whether the district court erred in concluding that the Group's members had failed to exhaust administrative remedies for their substantive claims.

I. *Is the Ringer Group's Action an Action to Recover on a Claim Arising Under the Act?*

This court has held that the statute limiting the jurisdictional basis of claims arising under the Medicare Act has a relatively narrow scope. In *Daniel H. Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473 (9th Cir.1981), we held that the language prohibiting reliance on the federal question or mandamus provisions for any action "to recover on a claim arising under" the Act only applied to actual claims for benefits. We noted that "when suit is brought simply to vindicate an interest in procedural regularity, there is no statutory bar." *Id.* at 476.[1] *See also Humana of South Carolina, Inc.*

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[1] In *Freeman*, the court concluded that the challenged action should not have been reviewed by the district court because the procedural propriety of the action depended on evaluation of facts that would be determined in a pending administrative pro-

v. Schweiker, 590 F.2d 1070, 1080 (D.C.Cir.1978); *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds sub nom. Califano v. Yamasaki*, 422 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[t]he distinction between due process questions relat[ing] to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts").

The district court rejected the Ringer Group's argument that its action was one for procedural relief rather than one for benefits. The district court noted that the Ringer Group's action included challenges to the procedure followed by the Secretary, but concluded that the Group's procedural challenges were "inextricably intertwined with [its] challenge of the validity of the determination denying them medicare coverage."

We cannot agree with the district court's conclusion that the procedural claims may not be considered apart from the substantive claims. The major thrust of the Group's complaint is that the Secretary's presumptive rule that the BCBR operation is not reasonable and necessary was an unlawful administrative mechanism for determining awards of benefits. The Ringer Group sought, first and foremost, to invalidate the Secretary's procedure. In several parts of its prayer for relief the Ringer Group does appear to ask for substantive relief

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ceeding. The Secretary argues that the Ringer Group's challenge should not be decided because, even if the district court had jurisdiction, the "procedural claim was intimately related to their [sic] substantive claims." We note below that we do not accept the premise of the Secretary's argument, i.e., that the procedural claims are intimately related to the substantive claims. We see no facts that might be developed at an administrative hearing that would aid the court in resolving the procedural questions. Furthermore, an extensive record has been compiled in the administrative proceedings held thus far, to which the court could look in order to determine any facts that it might find useful.

by suggesting that the court should require the Secretary to declare the BCBR operation reasonable and necessary. We recognize that such claims are essentially claims for benefits. But we do not see these claims as the central element of the complaint, and we believe the procedural claims may be considered apart from these claims.

The Group has primarily sought to prevent a binding ruling that the BCBR operation is not reasonable and necessary, and has only secondarily sought to have the court declare that the operation should in fact be considered reasonable and necessary. We therefore conclude that the procedural claims raised by the Ringer Group are properly brought under the federal question and mandamus statutes.

II. ***Did the Ringer Group Fail to Exhaust Administrative Remedies for its Substantive Claims for Benefits?***

In addition to its procedural claims, the Ringer Group—in claiming that the BCBR operation is reasonable and necessary, and in seeking an injunction to require the Secretary to declare the operation reasonable and necessary—has raised substantive claims for benefits. These claims do not suggest that the Secretary followed improper procedures, but that he reached an improper substantive result in the process of determining whether benefits should be awarded. The Group has not sought relief in the form of an actual award of benefits, but that is only because other (relatively minor) substantive determinations must be made. A claim for recovery of benefits cannot be transformed into some other type of claim simply by challenging one of the substantive determinations rather than the final result.

The courts have jurisdiction to review substantive claims for benefits only after administrative remedies have been exhausted. *See* 42 U.S.C.A. §§ 405(g) &

405(h) (West Supp.1982).[2] The district court concluded that it had no jurisdiction to hear substantive claims because the members of the Ringer Group failed to exhaust their administrative remedies.

We cannot agree with the district court that the members of the Group had failed to exhaust administrative remedies to the extent required by subsection 405(g). Although the members of the Group did not take administrative appeals, we find that such appeals were not required in this case.

The Supreme Court has indicated two circumstances under which administrative appeals may be dispensed with as a prerequisite to jurisdiction under subsection 405(g). In *Weinberger v. Salfi*, 422 U.S. L.Ed.2d 522, 538-40 (1975), the Court allowed a claim under subsection 405(g) because the Secretary had not complained of the failure to exhaust administrative remedies. The Court noted the purposes of the exhaustion requirement:

> Exhaustion is generally required as a matter [sic] of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

422 U.S. at 765, 95 S.Ct at 2467, 45 L.Ed.2d at 538-39. The Court then held that appeals are unnecessary when the agency has concluded that, for its purposes, the decision is final. The Court summarized by noting that "[o]nce a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the

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[2] The claims cannot be heard under the federal question or mandamus statutes simply because they are appended to procedural claims which can be brought under those statutes.

Secretary's administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." 422 U.S. at 765-66, 95 S.Ct. at 2467, 45 L.Ed.2d at 538-39.

We find this exception to the requirement of administrative appeals applicable to this case. By issuing a ruling that purports to bind ALJs and the Appeals Council to the denial of benefits for BCBR operations, the Secretary has indicated that it has no interest in appeals at or beyond the ALJ level. Thus, the ruling makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation. Although nominally leaving the administrative review process open for claims involving this operation, the Secretary's ruling makes the results of that process both pre-ordained and immutable.[3] The ruling not only makes appeals futile, it also

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[3] The present case is thus distinguishable from *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123 (9th Cir. 1980), which also involved the scope of permissible judicial review under the standards of the Medicare Act. In the present case, the Secretary's decision meant that ALJ decisions were both predetermined and final for a particular category of claims. In *Pacific Coast*, however, the Secretary's decision did not abbreviate the administrative process. It merely affected a factual issue that was common to several claims, but that might be readdressed by the Secretary in each claim.

In *Pacific Coast*, the court held that the Secretary had erred in ruling that a particular provider's claims could not be calculated by using a stepped up basis. Although the stepped up basis dispute involved the validity of claims from several years, the court in *Pacific Coast* would only apply its ruling to the single claim which had satisfied the process of administrative review required by the Medicare Act. Claims from other years, the court observed, had not been denied full review by the Secretary and might provide the Secretary an opportunity "to review his original decision." 633 F.2d at 138. Thus, the court concluded that claims from other years, although arguably excused

indicates that the Secretary believes appeals are worthless to the Agency as well as the claimant. Thus, as in *Salfi*, there is no reason to deny immediate access to judicial review under subsection 405(g).[4]

The Supreme Court has also found administrative appeal unnecessary when an appeal would fail to vindicate all the interests pressed by claimants, even if the claimant won the appeal. Thus, in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court allowed a claimant immediate judicial review under subsection 405(g) because the claimant asserted that he was erroneously denied a hearing before deprivation of benefits. 424 U.S. at 331-32, 96 S.Ct. at 900-01, 47 L.Ed.2d at 31. The Court concluded that the claimant had "raised at least a colorable claim that . . . an erroneous termination [of benefits] would damage him in a way not recompensable through retroactive payments." 424 U.S. at 331, 96 S.Ct. at 901, 47 L.Ed.2d at 31.

The Ringer Group has similarly presented a colorable claim that its members will not be compensated by an award of benefits on appeal. Specifically, the Group asserts that it has a right to have a determination of the

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from traditional, judicially constructed exhaustion requirements, could not satisfy the more rigorous limits that 42 U.S.C. § 405(h) places on judicial review of Medicare provider claims.

[4] Members of the Ringer Group who have not yet applied for benefits do not appear to have presented their claim at a sufficiently high level. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522, 538 (1975) (plaintiffs who had not filed claim for benefits had not met jurisdictional requirements of subsection 405(g)). This does not, however, preclude the court from ordering the Secretary to withdraw its ruling on the basis of the claims of those who have applied for benefits, or of awarding benefits to those who have applied, if the court feels it is appropriate to award benefits. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 704, 99 S.Ct. 2545, 2559 61 L.Ed.2d 176, 194 (1979) (approving order granting relief to persons "when they claim" benefits).

reasonableness and necessity of the BCBR operation made without the prejudice—and the necessary appeal—resulting from the HCFA ruling. Thus, even though ALJs were consistently awarding benefits when the Group brought this action, the interest asserted by the Group was not being vindicated in the course of administrative appeals. The Group's interest in receiving benefits without having its claims prejudged can only be vindicated by judicial review. Accordingly, immediate judicial review was appropriate in this case.[5]

CONCLUSION

Jurisdiction over the procedural claims was properly alleged under 28 U.S.C.A. § 1331 (West Supp. 1982), or 28 U.S.C. § 1361 (1976). Jurisdiction over the substantive claims was properly alleged under 42 U.S.C.A. § 405(g) (West Supp. 1982). The order dismissing for lack of jurisdiction is accordingly REVERSED, and the cause is REMANDED for further proceedings consistent with this opinion.

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[5] The Secretary argues that even though this argument may have been valid when ALJs were awarding benefits, it is no longer valid because claimants will be denied benefits on appeal and can therefore seek review of that denial following appeal. The Secretary does not indicate, however, why an appeal that is of no value to either the agency or the claimant should be required. *Cf. Weinberger v. Salfi*, 422 U.S. 749, 765–66, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522, 538–39 (1975) (appeal not required if futile for applicant and unsupported by any administrative or judicial interest).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 80-4132 MRP

FREEMAN H. RINGER, ET AL., PLAINTIFFS

v.

PATRICIA ROBERTS HARRIS, DEFENDANT.

FILED: Feb. 18, 1981

ORDER GRANTING MOTION TO DISMISS

Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(6) came on for hearing before the Court on December 15, 1980. Following oral argument, the motion was taken under submission.

FACTS

Plaintiffs are individuals who are eligible for health insurance benefits under Medicare and their physician, Dr. Winter ("Winter"). Winter has prescribed for plaintiffs a surgical procedure known as bilateral carotid body resection ("BCBR"). Plaintiffs Sanford Holmes, Norman R. Webster-Zieber, Dorothy Briggs and Jean Vescio (proposed "subclass A") have undergone this surgery and have filed claims for reimbursement of hospital fees as well as physician services. Plaintiff Freeman H. Ringer (proposed "subclass B") has not yet undergone the surgery, and, consequently, has filed no claim for reimbursement. Plaintiffs bring this action as a class action pursuant to Rule 23(b)(2); the plaintiff class has not yet been certified.

This case arises under Title XVIII of the Social Security Act, which established the federally funded health insurance program generally referred to as "Medicare." 42 U.S.C. § 1395 *et seq.* Claiming that the BCBR procedure is not reasonable and necessary for diagnosis or treatment of illness or injury, as required by 42 U.S.C. § 1395y(a)(1), the fiscal intermediary[1] has denied claims for reimbursement of hospital fees covering the procedure to the plaintiffs who have undergone the procedure (proposed subclass A).

Upon denial of benefits for hospital fees, a claimant has a right to a hearing before an Administrative Law Judge ("ALJ") in the Department of Health and Human Services ("HHS"), pursuant to 42 U.S.C. § 1395ff(b)(1). Although each of the named plaintiffs in proposed subclass A has requested an administrative hearing on the claim of beneifts for the BCBR procedure, none has received a ruling as of the date of this hearing. Some are awaiting a decision from the ALJ, while others are awaiting the hearing itself.

Following the issuance of HHS administrative decisions granting reimbursement to certain other claimants, none of whom are plaintiffs in the present case, the Health Care Financing Administration of the Medicare Bureau sought review by the Appeals Council. In its decision dated October 18, 1979, the Council explained that it "took jurisdiction" because of a March 1978 Task Force Report which cast doubt on the correctness of the ALJ's decision. Nevertheless, the Appeals Council held that the claimant-appellees were en-

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[1] Under the Medicare program, the actual reimbursement for the cost of medical services is usually effected through a "fiscal intermediary." These private, non-governmental entities serve as agents for the Department of Health and Human Services in the day to day administration of the Medicare program. *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 126 (9th Cir. 1980).

titled to payments under Part A of Title XVIII for the services furnished during hospitalization for a bilateral carotid body resection. The Appeals Council cautioned that the decision was "not to be cited as precedent," because "[f]uture studies and data may compel a different conclusion." Decision of Appeals Council at 23, Exhibit A to Plaintiffs' Memorandum in Support of the Motion for Preliminary Injunction.

By letter dated March 6, 1980, defendant announced a formal ruling of the Health Care Financing Administration that BCBR, performed to relieve respiratory distress, is not a covered service. According to the HHS notice, this ruling merely restated the existing policy.

In this action, plaintiffs seek to enjoin the defendant from pursuing the current Medicare coverage policy which "forces eligible Medicare beneficiaries to pursue individual administrative appeals in order to obtain Medicare benefits for the BCBR procedure." Plaintiffs also seek an order compelling defendant to amend the Medicare manual to provide that BCBR is a reasonable and necessary treatment for obstructive pulmonary conditions.

DISCUSSION

The district court may not review the benefit decisions of the Secretary of the Department of Health and Human Services ("HHS") without prior exhaustion of administrative remedies. *Weinberger v. Salfi*, 442 U.S. 749 (1975); *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123 (9th Cir. 1980). The failure to satisfy the requirement of administrative exhaustion deprives the court of federal question jurisdiction. It is the law in this circuit that the application of the requirement of exhaustion is not discretionary with the district court, and even the "appearance of futility will not waive the requirement." *Pacific Coast Medical Enterprises, supra* at 138. Indeed, in administrative hearings brought by the present plaintiffs, the position of

the Secretary as to the reasonableness and efficacy of the BCBR procedure may remain the same or may change as additional data is received and evaluated. On this state of the record, the Court cannot conclude that exhaustion of the administrative process would be futile.

The essence of plaintiffs' claim in the instant action is a claim of entitlement of benefits for the BCBR procedure. Although plaintiffs also advance a constitutional challenge founded on the rights to equal protection of the laws and substantive due process guaranteed by the Fifth Amendment of the United States Constitution, their constitutional attack upon the "vexatious" and "duplicative" appeals process is inextricably intertwined with their challenge of the validity of the determination denying them Medicare coverage. Where, as here, the constitutional claims are not "entirely collateral" to the substantive claims, the Court may not waive the requirement of administrative exhaustion. *See Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) and *Weinberger v. Salfi*, *supra*. The requirement remains a prerequisite to judicial review.

Sections 405(g) and (h) of Title 42 provide the exclusive vehicle for appealing the merits of the Secretary's denial of Medicare reimbursement claims. 42 U.S.C. § 1395ff(b). None of the plaintiffs have completed this prerequisite to judicial review.

Plaintiffs appear to argue that they should not be required to exhaust their administrative remedies because the Secretary should be collaterally estopped to relitigate the issue of entitlement of reimbursement for hospital fees incurred as a result of the BCBR procedure. Since one hundred ninety-nine (199) claimants, none of whom are parties to the present action, have litigated the issue of entitlement to reimbursement in proceedings before the ALJ, plaintiffs contend that the doctrine of offensive collateral estoppel should apply in

the present case, as it did in *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979).

The Court has broad discretion in determining the propriety of the offensive use of collateral estoppel. *Parkland Hosiery Co. v. Shore*, 439 U.S. 322 (1979). This discretion should be exercised with caution where the doctrine is invoked to avoid the requirement that administrative remedies be exhausted. In this case, plaintiffs implicitly ask the Court to bypass a ruling by the ALJ on the issue of collateral estoppel on the assumption that, if summary judgment were sought on that issue, it would be erroneously denied in all cases. The Court is also asked to speculate on what, if anything, the Appeals Council would do in such a case. The Court refuses to engage in such conjecture.

In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), the case principally relied upon by plaintiffs, Continental had obtained a favorable decision against the Secretary of Labor ("Secretary") before the ALJ and the decision was affirmed by the Occupational Safety and Health Review Commission ("Commission"). Thereafter, the Secretary issued a second set of citations based on identical complaints involving the same facts, and Continental moved for summary judgment before the Commission on the ground of collateral estoppel. The Commission held that Continental did not satisfy the requirements for the application of collateral estoppel, denied its motions for summary judgment, and remanded the cases for hearing. The District Court enjoined the Secretary from prosecuting all pending and future citations against Continental and the Court of Appeals for the Seventh Circuit affirmed, stating that the Commission should have applied collateral estoppel to dispose of the remaining citations against Continental and that relitigating the issue was harassment in violation of due process.

Here, not only has there been no adjudication of the issue of collateral estoppel in the administrative proceedings as there was in *Continental Can Co. v. Marshall*, *supra*, but in this factual setting, it is doubtful that the doctrine is even applicable. As stated above, the Appeals Council has cautioned that its decision should not be regarded as precedent. In addition, it is certainly possible that the rulings of the ALJ may vary from case to case based on the medical histories, diagnoses and needs of the individuals involved. Under these circumstances, the proceedings before the ALJ and the Appeals Council are the appropriate forum for determining the reasonableness and necessity of the BCBR procedure and the propriety of the application of collateral estoppel in reaching that determination. If the ALJ and the Appeals Council err, redress can be sought in the District Court after exhaustion of the administrative remedies. Since the plaintiffs have failed to satisfy the requirement of administrative exhaustion, the Court is without jurisdiction under Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*

As the final point, the Court finds no merit in the contention that the federal mandamus statute, 28 U.S.C. § 1361, provides a basis for the Court's jurisdiction over members of proposed subclass B, the plaintiffs who have not undergone the BCBR procedure. Although § 405 does not necessarily preclude mandamus jurisdiction, mandamus jurisdiction is precluded where, as here, the claim for benefits is not entirely divorced from due process questions. *Elliott v. Weinberger*, 564 F.2d 1219, 1226-27 (9th Cir. 1977). Mandamus is appropriate only if "the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Id.* at 1226. Mandamus will not lie where, as here, these traditional requirements are not satisfied. Accordingly,

IT IS HEREBY ORDERED that the above entitled cause is hereby dismissed for want of jurisdiction of the subject matter, pursuant to Fed.R.Civ.P. 12(h)(3).

/s/ MARIANA R. PFAELZER
MARIANA R. PFAELZER
United States District Judge

DATED: FEBRUARY 12, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413
D.C. No. 80-04132

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZEIBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLEE.

FILED DEC. 30, 1982

ORDER

Before: NELSON and REINHARD, Circuit Judges, and EAST,* Senior District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5413
DC# CV 80-4132 MRP

FREEMAN H. RINGER, SANFORD HOLMES, NORMAN R. WEBSTER-ZEIBER, AND JEAN VESCIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND BENJAMIN WINTER, M.D., PLAINTIFFS-APPELLANTS,

v.

RICHARD S. SCHWEIKER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT/APPELLEE.

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is REVERSED and REMANDED.

Filed and entered AUGUST 19, 1982

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.
>
> (b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

2. 28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Sections 205(g) and (h) of the Social Security Act, as codified at 42 U.S.C. (& Supp. V) 405 (g) and (h), provide in relevant part:

> **(g) Judicial review**
>
> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such fur-

ther time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.

* * *

(h) Finality of Secretary's decision

The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter.

4. Section 1869 of the Social Security Act, 42 U.S.C. 1395ff(a) and (b), provides in pertinent part:

§ 1395ff. Determinations of Secretary

(a) Entitlement to and amount of benefits

The determination of whether an individual is entitled to benefits under part A or part B, and the determination of the amount of benefits under part A, shall be made by the Secretary in accordance with regulations prescribed by him.

(b) Appeal by individuals

(1) Any individual dissatisfied with any determination under subsection (a) of this section as to—

(A) whether he meets the conditions of section 426 or section 426a of this title, or

(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of part B of this subchapter, or section 1395i-2 of this title, or section 1819, or

(C) the amount of benefits under part A (including a determination where such amount is determined to be zero)

shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

(2) notwithstanding the provisions of subparagraph (c) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000.

* * *